

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 214 OF 2005

Mukhtarali Mohd. Johari.

... Appellant.

V/s

The Municipal Corporation of
Greater Bombay.

... Respondent.

K.D.Jha for the appellant.

Ms.Geeta Joglekar for the respondent.

CORAM: A.S. OKA, J.

DATE: 7th March, 2005.

P.C. :

. Admit.

2. The Respondent waives service.

3. Taken up for hearing forthwith.

4. By the impugned judgment and order dated 12th

January 2005, a notice of motion for temporary injunction taken out by the Appellant in L.C.Suit No.1724 of 1997 has been dismissed. The learned counsel appearing for the Appellant submitted that a reliance was placed on number of documents which are annexed to the plaint. The said documents include assessment record as well as Inspection Report of Licence Inspector of the Respondent Corporation which shows existence of second floor. He submitted that

none of the documents are specifically considered by the learned trial Judge.

5. The learned counsel appearing for the Respondent submitted that the learned trial Judge has recorded a finding that none of the documents referred to in the reply to the notice issued under section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "said Act of 1888") could prove the authorisation of the structure and, therefore no interference is called for.

6. The perusal of the documents annexed to the plaint shows that in the year 1995 a notice under section 351 of the said Act of 1888 was issued alleging that there is unauthorised construction of third floor of the building in question. The said notice was replied by the Appellant. By order dated 18th December 1996 the said notice was treated as cancelled after considering the reply. It was stated in the said order dated 18th December 1996 that wrong description was given while drafting the said notice. A fresh notice was issued alleging that the construction of second floor was unauthorised. Reply was sent by the Appellant to the said notice pointing out that the Appellant was a tenant in respect of the

structure and the assessment record shows that the building has been in existence since 1961-62.

Reliance is placed on the assessment records.

7. The Appellant has annexed various documents to the plaint. One of the documents is a report of the Licence Inspector of the Respondent corporation which discloses that second floor of the suit building was in existence. Certificate dated 20th March 1991 issued by the Respondent Corporation shows that there is attic floor above first floor. The said attic floor is described as a store of M. John, Prop. of Huda Traders.

8. In the impugned order without specifically referring to any of the documents annexed to the plaint the learned trial Judge has held as under:

The suit structure is an unauthorised construction of 2nd floor; by raising the side way brick missionary wall.

The entire bldg. is tenanted to the plff. It consists of shops on the Gr. floor, godown on the 1st floor, and one attic on the 2nd floor.

The assessment abstract also shows one attic and not a room, a shop or a godown on the 2nd floor.

The photographs of the suit premises show the raising of the B.M. Wall by two diff. colours bricks.

documents in his plff has produced a no. of
the documents of reply to the notice, none of
toleration prove the authorisation or
demolition Consequently the DMC's order of removal and
is correct.

9. While considering the notice of motion finally

the learned trial Judge was under obligation to
examine the documents which are produced along with
the plaint. After considering the documents relied
upon by the Appellant as well as by the Respondent
corporation, the learned Judge could have recorded a
prima facie finding one way or the other. The
impugned order shows that not a single document except
photographs has been specifically considered by the
learned Judge while deciding the notice of motion.
The learned trial Judge has ignored that the
assessment record shows that the attic floor is used
as a store. The grievance of the Appellant is that
certain documents were sought to be produced at the
time of hearing of the motion and the learned Judge
did not allow production of the said documents and the
notice of motion was hastily decided. No reply was
filed by the Respondent to the notice of motion.

10. As the impugned order has been passed without

specifically considering the documents which are

produced by the Appellant, the same deserves to be set aside only on that ground.

11. Accordingly I pass the following order:

ORDER

(i) The impugned order dated 12th January 2005 is quashed and set aside and the Notice of Motion No.1510 of 1997 is remanded to the trial Court.

(ii) The parties will appear before the trial Court on 28th March 2005 for fixing schedule of hearing of the notice of motion. The Respondent Corporation is free to file a reply to the notice of motion within a period of four weeks from today.

(iii) The Appellant and the Respondent corporation are free to apply for permission to produce additional documents and, if such application is made, the same will be considered by the learned trial Judge on its own merits.

(iv) The learned trial Judge will decide the notice of motion in the light of the observations made by this Court as expeditiously as possible and in any event on or before 13th June 2005.

(v) Till the disposal of the notice of motion and for a period of fifteen days thereafter an ad-interim order which was operating during the pendency of the notice of motion will continue to operate.

(vi) All the contentions on merit are kept open.

12. The Appeal from Order is disposed of in the above terms with no order as to costs.

13. The parties and the concerned court to act on an authenticated copy of this order.

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CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 206 2005
IN
APPEAL FROM ORDER NO. 214 OF 2005

Mukhtarali Mohd. Johari.

... Appellant.

V/s

The Municipal Corporation of
Greater Bombay.

... Respondent.

K.D.Jha for the appellant.

Ms.Geeta Joglekar for the respondent.

CORAM: A.S. OKA, J.

DATE: 7th March, 2005.

P.C. :

. In view of disposal of the Appeal from Order,
this civil application does not survive. Civil
application is rejected.
